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IN THE

Supreme Court of the United States

October Term, 1967.

No. 651.

IRVING A. GLADSTONE, HERMINE J. NELSON and MICHAEL J. ROMANO, individually, and as President of New York City Elementary School Principals Association on behalf of its members,

Petitioners,

against

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondent.

PETITIONERS' REPLY BRIEF.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 RE 2-6978—1967

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PETITIONERS' REPLY BRIEF.

I.

Respondent's brief (p. 6) cited *McGowan v. Maryland,* 366 U. S. 420. The decision in that case stated that a governmental classification which "rests on grounds wholly irrelevant to the achievement of the State's objectives," denies to citizens the equal protection of the laws. 366 U. S. at page 425.

Respondent's intermediate school curriculum committee stated the objectives of its intermediate schools, as follows (R39):

> "PURPOSE
>
> "The design for new intermediate or Middle Schools has been prepared in answer to the Board

> of Education's directive to develop a new program of education for the intermediate years. 'This period of education,' the Board pointed out, 'must take the child from his elementary concentration on basic skills to the use of those skills in the acquisition of knowledge and the development of human and social relationships.' * * * 'The intermediate school,' the Statement of Policy continued, 'will add an extra ingredient of excellence—the sharing of learning experiences and life values with other children of different races, nationalities and economic status.'"

Respondent's above quoted objective for its intermediate schools is stated in broad, general language.

Obviously, the classification of elementary school principals in a lower pay scale than intermediate school principals is wholly irrelevant to respondent's above quoted objective, because even the respondent does not claim that an intermediate school principal is better qualified than an elementary school principal to "add an extra ingredient of excellence—the sharing of learning experiences and life values with other children of different races, nationalities and economic status" (R39). These objectives of racial tolerance and promotion of racial integration in the public schools apply to all of respondent's public schools, and not merely to its 45 intermediate schools. Respondent's 615 elementary schools have more than ten times as many Negroes, Puerto Ricans and white pupils therein as its 45 intermediate schools. Clearly, this objective of the respondent is not limited to its 45 intermediate schools.

Respondent's brief (p. 7) seeks to justify its different pay classifications for elementary and intermediate school principals on a different ground from the above quoted purpose of the intermediate schools, as follows:

> "Under the new intermediate school program, the emphasis on specialization will begin in the fifth and sixth grades in intermediate schools instead of in the seventh grade in junior high school.
>
> "Because junior high school principals have been tested as to their ability to supervise teachers who are licensed in specific subjects and as to their ability to administer a school on the basis of subject specialty and departmental instruction, they, and not elementary school principals, have been reassigned as principals of the intermediate schools (R59)."

This argument is contrary to respondent's Statement of Policy, which downgraded, instead of praising, teaching methods in junior high schools, as follows (R20):

> "The forces which produced the junior high school are not all significant at this time. New priorities of educational need have emerged. The junior high school no longer serves as a terminal school for any large number of pupils. Shifts in the curriculum have radically changed the subject matter emphasis of intermediate grades."

The Board's above quoted evaluation of its junior high schools made no mention of the value of methods of instruction "on the basis of subject specialty and departmental instruction." This is clearly an afterthought, newly invented by respondent to meet the exigencies of this lawsuit.

Even if methods of instruction "on the basis of subject specialty and departmental instruction" were the stated objective of respondent's intermediate schools, this would not be a relevant or substantial difference between respondent's intermediate and elementary schools, because the record shows that the purpose of such "specialization" was not to improve the education of students in the intermediate school grades 6 to 8 over the education of students in grades 6 to 8 in the elementary schools; and the

respondent does not claim that this is the purpose or the result of instruction "on the basis of subject specialty and departmental instruction" in its intermediate schools.

The record shows beyond dispute that, with or without departmentalized instruction by subject specialists, students in grades 6 to 8 receive exactly the same instruction in both the elementary and intermediate schools. They use the same textbooks. They are given the same tests, which require them to demonstrate the same degree of knowledge of the same subjects; and, when they do so, respondent gives them the same diplomas, which it recognizes and accepts as equivalent in all respects for admission to its high schools.

Since respondent, itself, thus made no distinction between instruction in grades 6 to 8 in its elementary and intermediate schools, the claimed "departmentalized instruction by subject specialists" is irrelevant, as a basis for classifying elementary school principals in a lower pay scale than intermediate school principals.

II.

Respondent's brief (p. 7) stated that petitioners' contention that "the same specialization exists in the sixth, seventh and eighth grades of both the elementary and intermediate schools" has "only limited support * * * in the record," consisting of "statements concerning limited specialization in these elementary school classes."

The extensive quotations from the record in our petition herein (pp. 15-19) clearly show that the record fully supports our statement that the same specialization exists in grades 6 to 8 in both elementary and intermediate schools, and not merely "limited specialization" in such grades in the elementary schools.

In deciding petitioners' claims that their constitutional right to equal protection of the laws was violated, this Court will "decide for itself facts or constructions upon which federal constitutional issues rest." *Kern-Limerick, Inc., v. Scurlock,* 347 U. S. 110, 121. See, also: *Napue v. Illinois,* 360 U. S. 264, 271-272; *Niemotko v. Maryland,* 340 U. S. 268, 271.

Since the state Court dismissed petitioners' complaint, without a trial, this Court may also leave open this factual issue, to allow the state Court to make the necessary findings, on remand, after a trial. *Merchants National Bank v. Richmond,* 256 U. S. 635, 638.

Such a remand would be necessary only if this Court shall decide that "departmentalized instruction by subject specialists" is a valid basis for making different pay classifications of principals in respondent's elementary and intermediate schools.

However, we submit that for the reasons stated in our petition, pages 19-20, even if departmentalized instruction by subject specialists were used only in respondent's intermediate schools, and not in its elementary schools, this would not be a relevant or substantial difference, in the face of the undisputed facts that elementary and intermediate school principals both administer schools that give instruction in grades 6 to 8, using the same textbooks; pupils are transferred in grade between such schools, and the result of the teaching in both types of schools is measured by the same tests to the same degree, and certified by the same diplomas, which the respondent itself accepts as equivalent in all respects for admission to its own high schools.

III.

Respondent's brief (p. 6) cited *Kavanagh v. Brown*, 206 F. Supp. 479, aff'd 371 U. S. 35. That case decided that a state constitutional provision barring an increase in the salary of an incumbent Judge of a state court, during his fixed term of office, provided a reasonable basis for withholding a newly enacted statutory salary increase from an incumbent Judge during his fixed term of office; and that application of such salary increase to other Judges in the same state court, whose term of office began after the enactment of such statute, did not deny to incumbent Judges the equal protection of the laws.

In this case, unlike the *Kavanagh* case, no constitutional or statutory provision of the State of New York bars the immediate equalization of petitioners' salaries with the salaries of intermediate school principals. Therefore, the *Kavanagh* case has no application to the facts in this case. The clear implication of the *Kavanagh* case is that but for the constitutional provision barring an increase in the salary of an incumbent Judge during his fixed term of office, the constitutional provision for equal protection of the laws would entitle incumbent Judges to the same salaries as new Judges whose term of office began after the enactment of such statute.

In *Matter of Benvenga v. LaGuardia*, 294 N. Y. 526, the New York Court of Appeals decided that a statute that authorized the City of New York to increase local supplemental salaries of Justices of the State's Supreme Court elected in such city, applied to newly elected Justices, as well as to incumbent Justices; and that the City of New York could not withhold such increases from newly elected Justices of the State's Supreme Court. The *Benvenga* case involved no question concerning a constitutional bar to increasing salaries of incumbent Judges.

The New York Court of Appeals there said that "the statute evidences the legislative desire to assure a *non-discriminatory* and an *unreduced* compensation to *all* the Justices elected in the first and second districts" (294 N. Y. at p. 532, italics by the Court).

Respondent's brief (p. 8) also cited *Thomson v. Board of Education*, 201 N. Y. 457, as holding that "the license held, not the work performed, determines the salary to be paid." This is not what the Court decided in the *Thomson* case, in which the Court decided that:

> "* * * a municipal officer, who has been unlawfully removed from his position and has acquiesced in the removal, cannot recover the salary incident thereto during the period in which he has performed no service" (p. 460).
>
> "* * * the right to a position or office is what determines the right to the salary incident thereto, and that a person who regularly holds a place in one grade and performs the duties of a higher grade to which he has not been regularly appointed, does not thereby become entitled to the salary of the higher grade" (pp. 465-466).

The principles quoted above have no application to the facts in this case. The petitioners were not removed from office, and their petition herein does not seek to recover pay for a period of time during which they performed no service.

The petitioners were regularly appointed as elementary school principals. They do not seek "the salary of the higher grade" of junior high school principal, and they do not allege that without regular appointment they performed the duties of a junior high school principal. Instead, their complaint alleges that petitioners were regularly appointed as elementary school principals; that intermediate school principals are performing duties as elementary school principals and receiving greater pay

therefor than elementary school principals; and it seeks equalization of petitioners' pay with the pay of intermediate school principals, as elementary school principals, and not as junior high school principals.

Therefore, the *Thomson* case (201 N. Y. 457), as well as the *Hazen, Hoefling* and *Bacon* cases (127 App. Div. 235; 120 App. Div. 545; 205 Misc. 73, aff'd 285 App. Div. 1046, leave to appeal denied 309 N. Y. 1030), are irrelevant to the facts in this case, because this case, unlike the cited cases, involves a claim for equalization of salary in a position to which the petitioners were regularly appointed, and it does not involve any claim to salary applicable to a different position to which the petitioners were not regularly appointed.

Respondent's brief (p. 8) also cited the *Lapolla* and *Burns* cases (301 N. Y. 580; 301 N. Y. 584) as sustaining "the legality of pay schedules granting higher salaries to junior high school principals than to elementary school principals and granting higher salaries to senior high school principals than to junior high school principals."

But, as noted above, the petitioners are not seeking the pay of junior high school principals, or the pay of senior high school principals. Instead, they seek only equalization of their pay as elementary school principals with the pay of intermediate school principals, who administer schools giving instruction in the same grades 6 to 8, which the petitioners are licensed to administer, and all the petitioners administer schools giving instruction in grade 6, as well as grades 1 to 5, and some of the petitioners administer schools giving instruction in grades 6 to 8, as well as grades 1 to 5.

In our petition (pp. 23-24), we said that it is illogical for respondent to argue that petitioners are seeking a pay scale not applicable to elementary school principals, when

it is the intermediate school principals who have no license as elementary school principals and no salary scale applicable to intermediate schools, and they are serving out-of-license in the intermediate schools, and receiving more pay for their out-of-license work than petitioners receive for their "in license" work administering schools that teach the same grades 6 to 8 as the intermediate schools.

CONCLUSION.

The petition for a writ of certiorari should be granted.

October 30, 1967.

Respectfully submitted,

MORRIS WEISSBERG,
Attorney for Petitioners.